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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RALPH PRATHER, JR., Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B212533 (Los Angeles County Super. Ct. No. BC386793)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and Appellant.

Carmen A. Trutanich, City Attorney, Robin O'Sullivan, Deputy City Attorney, and Richard M. Brown, General Counsel, for Defendant and Respondent.

INTRODUCTION

Plaintiff Ralph Prather, Jr. appeals the judgment of dismissal entered after a demurrer to his first amended complaint was sustained without leave to amend. We conclude that plaintiff has not demonstrated how he can amend his pleading to state a cause of action, and we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed the present action against the City of Los Angeles (City) on March 5, 2008. The trial court sustained a demurrer to the original complaint, and plaintiff filed the operative first amended complaint on July 14, 2008. It alleged as follows.

Plaintiff is a security officer with the Los Angeles Department of Water and Power (DWP). From 2005 to 2007, plaintiff urged his coworkers to vote to decertify their present union, Local 347 of the Service Employees International Union (SEIU), and to join Local 18 of the International Brotherhood of Electrical Workers (IBEW). Among other things, plaintiff disseminated to all DWP security officers a petition for decertification of the SEIU and spoke out about negative aspects of SEIU representation. Plaintiff also assisted other City employees in grievances and disciplinary matters and spoke out about safety issues within the DWP.

In retaliation for plaintiff's union activities, in 2006, Lieutenant Robert Butler distributed to all DWP security officers a flier caricaturing plaintiff as the devil. Butler posted the flier at all security posts. When plaintiff objected, Butler threatened him and other security officers who supported him.

When plaintiff complained of Butler's harassment to Chief of Security Jerry Cabrera and Director of Security Gonzelo Cureton, they yelled at him and threatened him with termination. Further, they promoted Butler, denied plaintiff overtime, and harassed

him, including by creating an atmosphere "whereby Plaintiff was depicted as a White Devil in a workplace with predominantly African-American and Hispanic employees."

Plaintiff asserted that the retaliation alleged in his complaint violated (1) the public policy articulated in article 1, section 1 of the California Constitution, and (2) Government Code sections 3502 and 3506 and City of Los Angeles Employee Relations Ordinance section 4.857. He sought damages and an injunction prohibiting the City and its employees from retaliating against him for engaging in protected activities.

The City demurred to the first amended complaint. Plaintiff opposed, contending that both causes of action were adequately pled. He also sought leave to amend to allege retaliation in violation of the First and Fourteenth Amendments to the United States Constitution.

The trial court sustained the demurrer without leave to amend, finding that "the pleaded facts fail to state any claim under the asserted statutory, regulatory or constitutional authorities." Judgment was entered on October 6, 2008, and notice of entry of judgment was served on October 7, 2008. Plaintiff timely appealed.

STANDARD OF REVIEW

"To assess the pleading's sufficiency, 'we independently review the complaint to determine whether the facts alleged state a cause of action under any possible legal theory.' (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 998; see *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 986.) We will affirm 'if proper on any grounds stated in the demurrer, whether or not the court acted on that ground.' (*Carman v. Alvord* [(1982)] 31 Cal.3d [318,] 324.) On appeal, 'the plaintiff bears the burden of demonstrating that the trial court erred' in sustaining the demurrer. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879.)" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 399-400.)

"In undertaking our independent review, 'we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.' (*Blank v. Kirwan*

[(1985)] 39 Cal.3d [311,] 318; see *Schifando v. City of Los Angeles* [(2003)] 31 Cal.4th [1074,] 1081.) 'If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer.' (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 38.)" (*Hoffman v. Smithwoods RV Park, LLC, supra*, 179 Cal.App.4th 390 at p. 400.)

"When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. (*Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.) The plaintiff may make this showing for the first time on appeal. (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1623; *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1386-1388.)" (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

"To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' [Citation.] The assertion of an abstract right to amend does not satisfy this burden. [Citation.] The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary. [Citation.]" (*Rakestraw v. California Physicians' Service, supra*, 81 Cal.App.4th at pp. 43-44.)

DISCUSSION

On appeal, plaintiff does not contend that the trial court erred in sustaining the demurrer to the two causes of action alleged in the first amended complaint. Any such contention therefore is forfeited on appeal. (E.g., *Berg & Berg Enterprises, LLC v. Boyle*

(2009) 178 Cal.App.4th 1020, 1048, fn. 27.) He urges, however, that if given an opportunity to do so, he could amend his complaint to allege two new causes of action: (1) violations of the First Amendment to the United States Constitution (actionable through 42 U.S.C. § 1983); and (2) violations of Labor Code sections 6399.7 and 6310. Further, he claims that he could assert these causes of action against the City *and* Robert Butler, Jerry Cabrera, and Gonzelo Cureton (collectively, the individual defendants), named as Doe defendants in the first amended complaint. We therefore consider the viability of plaintiff's proposed new claims.

I. Proposed Cause of Action for Violation of the First Amendment of the Constitution of the United States

Plaintiff contends that if permitted to do so, he will be able to amend his complaint to allege a cause of action against the City and the individual defendants for violations of his First Amendment rights to free speech (i.e., the right to speak out in favor of one union and against another) and free association. These violations are alleged to be actionable pursuant to section 1983 of title 42 of the United States Code (section 1983).

Section 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." To state a claim under section 1983, thus, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated; and (2) that the alleged violation was committed by a person acting under the color of state law. (*West v. Atkins* (1988) 487 U.S. 42, 48; *Ketchum v. County of Alameda* (9th Cir. 1987) 811 F.2d 1243, 1245.)

The City contends that plaintiff has not established that he can plead a violation of a right secured by the Constitution because "neither the Opening Brief nor the [first amended complaint] provide facts showing that [plaintiff's] 'speech addressed an issue of public concern' entitled to constitutional protection. (*Desrochers v. City of*

San Bernardino (9th Cir. 2009) 572 F.3d 703, 709.)" The City is correct that to plead a violation of the First Amendment, plaintiff must allege that he was retaliated against for speaking on a matter of "public concern." (*Desrochers v. City of San Bernardino*, *supra*, 572 F.3d at pp. 708-709.) The Ninth Circuit "ha[s] 'not articulated a precise definition of "public concern,"'" but "[i]t is clear . . . that the essential question is whether the speech addressed matters of 'public' as opposed to 'personal' interest." (*Id*. at p. 709.) The court has "defined the 'scope of the public concern element . . . broadly,' [citation], and adopted a 'liberal construction of what an issue "of public concern" is under the First Amendment' [citation]." (*Id*. at pp. 709-710.) In contrast, "'[s]peech focused solely on internal policy and personnel grievances does not implicate the First Amendment.'" (*Lambert v. Richard* (9th Cir. 1995) 59 F.3d 134, 136.)

Employee speech concerning "the benefits of unionization" has been held to be a matter of public concern (*Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 646-648; see also A*merican Postal Workers Union, AFL-CIO v. U.S. Postal Service* (D.C. Cir. 1987) 830 F.2d 294, 301 ["The urge to unionize certainly falls within the category of expression that is 'fairly considered as relating to any matter of political, social, or other concern to the community'"]), as has speech made by a union representative concerning alleged problems in a public work place (*Lambert v. Richard*, *supra*, 59 F.3d at p. 137). Accordingly, we conclude that plaintiff's allegation that he was retaliated against for circulating a petition encouraging DWP employees to decertify one union in favor of another implicated a matter of public concern.

The City also contends that plaintiff has never shown that he can plead unconstitutional conduct "under color of state law" in the manner required by *Monell v. Department of Social Serv*ices *of the City of New York* (1978) 436 U.S. 658, 663 (*Monell*). The United States Supreme Court held in *Monell* that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Id*. at p. 690.) However, "a municipality cannot

be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." (*Id*. at p. 691.) Thus, "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Id*. at p. 694.)

A section 1983 plaintiff may establish municipal liability in one of three ways. "First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a 'longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity.' *Jett v. Dallas Indep. Sch. Dist*., 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) . . . ; *accord Monell*, 436 U.S. at 690-91. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with 'final policy-making authority' and that the challenged action itself thus constituted an act of official governmental policy. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986) . . . ; *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983). Whether a particular official has final policy-making authority is a question of state law. *See Jett*, 491 U.S. at 737; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-24, 99 L.Ed.2d 107, 108 S.Ct. 915 (1988) (plurality opinion) (*Praprotnik*). Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it. *See Praprotnik*, 485 U.S. at 127; *Hammond v. County of Madera*, 859 F.2d 797, 801-02 (9th Cir. 1988)." (*Gillette v. Delmore* (9th Cir. 1992) 979 F.2d 1342, 1346-1347.)

Plaintiff asserts for the first time in his appellant's reply brief that "because the complained-of conduct ***was*** the result of a governmental policy and/or custom, it would be a simple matter to include such an allegation in [an] amended complaint."

Although we could disregard plaintiff's improper argument made for the first time in his reply brief (*Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1329, fn. 5), we will consider it and explain why it has no merit.

"Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiff's blithe assurance that he can properly plead a claim of municipal liability under section 1983 is not enough. "To find a municipality liable under section 1983, a plaintiff must identify a municipal policy or custom that caused the constitutional injury." (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1295.) At this late stage of the proceedings, plaintiff remains unable to identify the governmental policy or custom that led to his injury. We must assume that he cannot do so.

II. Proposed Cause of Action Under Labor Code Sections 6399.7 and 6310

Plaintiff "submits that the same set of facts present in his First Amended Complaint . . . can also be the basis" to allege that defendants retaliated against him for reporting "incidents regarding safety conditions at his workplace." He contends that such an allegation would state a cause of action against the City and the individual defendants for violations of sections 6399.7 and 6310 of the Labor Code. For the reasons that follow, we conclude that plaintiff cannot state a claim under either statute.

A. Labor Code Section 6399.7

Labor Code section 6399.7 prohibits discrimination against any employee for filing a complaint or instituting a proceeding "under or related to the provisions of this chapter" or exercising any right afforded "pursuant to the provisions of this chapter." "This chapter" is chapter 2.5 of the California Occupational Safety and Health Act (Cal-OSHA), entitled the "Hazardous Substances Information and Training Act." (Lab. Code, § 6360.) It requires the Director of Industrial Relations (*id.*, § 6302) to prepare a list of substances that "are present in the workplace as a result of workplace operations in

such a manner that employees may be exposed under normal conditions of work or in a reasonably foreseeable emergency resulting from workplace operations" (Lab. Code, § 6362) and are "potentially hazardous to human health" (*id.*, §§ 6380, 6382). Substances present on the list of hazardous substances are subject to the provisions of chapter 2.5 (Lab. Code, §§ 6390-6399.2); "[s]ubstances not present on the list of hazardous substances adopted pursuant to Section 6380 shall not be subject to the provisions of this chapter" (*id*., § 6381).

Although plaintiff asserts that he can amend his complaint to allege that he was subject to retaliation for reporting "incidents regarding safety conditions at his workplace," nothing suggests that the "safety conditions" he allegedly reported concerned "hazardous substances" within the meaning of chapter 2.5 of Cal-OSHA. Accordingly, because section 6399.7 addresses only discrimination against employees for filing complaints or instituting proceedings "under or related to the provisions of" chapter 2.5, plaintiff has not established that if given the opportunity to amend, he could state a claim pursuant to section 6399.7.

B. Labor Code Section 6310

Labor Code section 6310, subdivision (b) provides in pertinent part: "Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to . . . his or her employer, . . . of unsafe working conditions, or work practices, . . . shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer." This section thus permits an action for damages if an employee is discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. (*Daly v. Exxon Corp*. (1997) 55 Cal.App.4th 39, 43-44.)

Plaintiff believes he has alleged that he was denied overtime for reporting "incidents regarding safety conditions at his workplace." The City responds that the first

amended complaint's vague allegation does not state a claim under the statute. We agree with the City.

Plaintiff directs our attention to paragraph 22 of the first amended complaint. It states: "Plaintiff also assisted other employees of City, in grievances and disciplinary matters. Plaintiff spoke up and brought to light safety issues within the DWP. He actively worked towards improving working conditions for his bargaining unit."

Nothing in that paragraph remotely suggests that plaintiff "made a bona fide oral or written complaint" of unsafe working conditions. For all we know, plaintiff "spoke up" at a union meeting. Even if we assume plaintiff complained, he does not allege to whom he lodged his complaint. As with plaintiff's section 1983 claim, it is too late in the proceedings to leave out factual allegations upon which potential recovery lies.

DISPOSITION

The judgment of dismissal is affirmed. The City shall recover its costs on appeal.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.